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MICHAEL RODAK, JR.,

In the Supreme Court of the United States

October Term, 1971

No. 72-_____

CITIZENS ORGANIZED TO PRESERVE OUR ENVIRONMENT, *et al.*,
Petitioners,

vs.

RICHFIELD BOARD OF ZONING APPEALS
and
OHIO SPORTS CENTER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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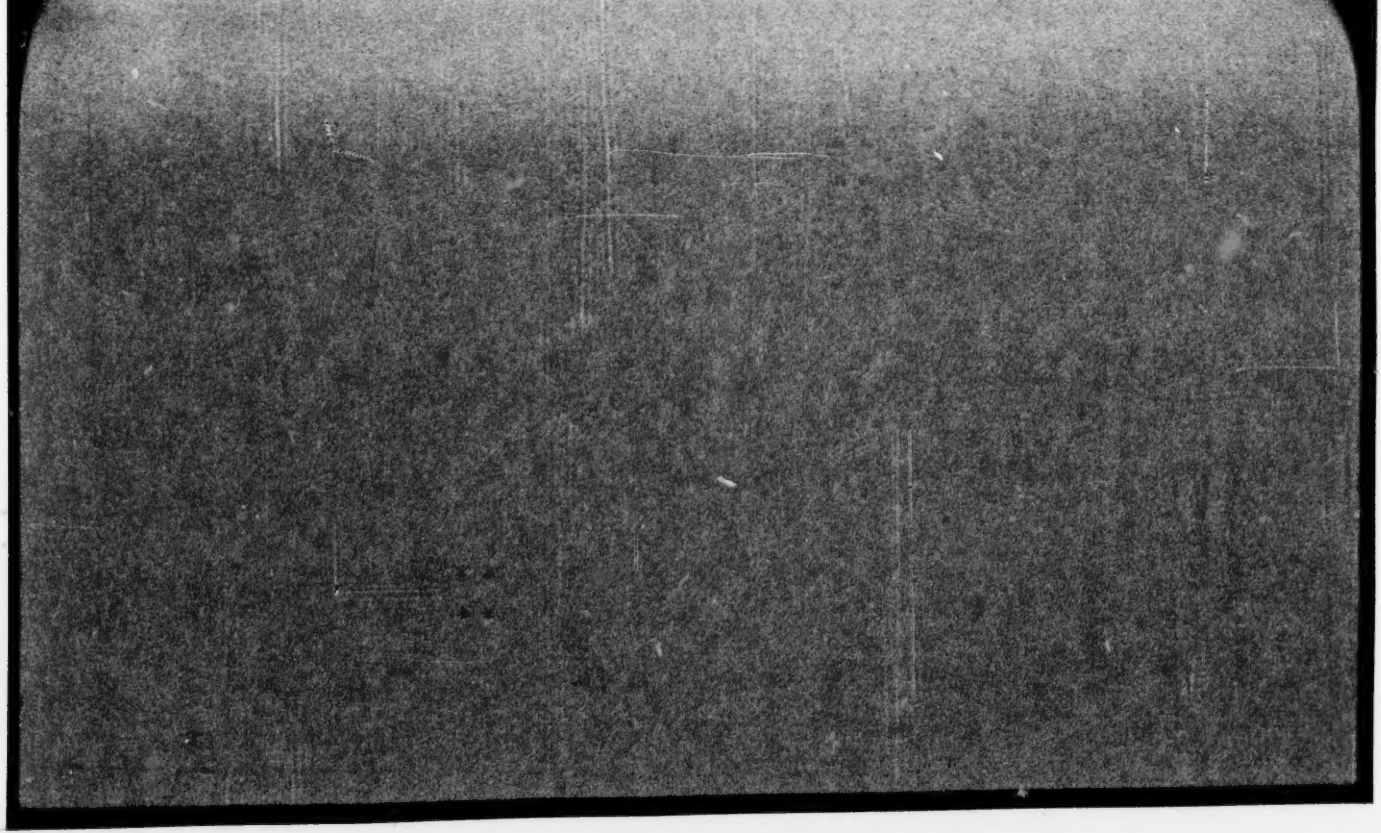

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioners, COPE (a non-profit Ohio corporation), Richard W. Wagner, and Paul C. Davis, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on March 16, 1972.

OPINIONS BELOW

Unreported opinions were rendered by the Court of Common Pleas of Summit County, Ohio and the Court of Appeals of Summit County. Copies of the opinions are contained in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 16, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Whether the zoning appeals hearing provision of §519.15 of the Ohio Revised Code was so applied as to violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

STATUTORY PROVISIONS INVOLVED

§519.15 of the Ohio Revised Code (in pertinent part):

> Appeals to the board of zoning appeals may be taken by any person aggrieved or by any officer of the township affected by any decision of the administrative officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the board of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.
>
> The board of zoning appeals shall fix a reasonable time for the public hearing of the appeal, give at least ten days' notice in writing to the parties in interest, give notice of such public hearing by one publication in one or more newspapers of general circulation in the county at least ten days before the date

of such hearing and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any person may appear in person or by attorney.

STATEMENT OF THE CASE

This controversy arose as the result of a zoning appeal to the Board of Zoning Appeals of Richfield Township by respondent herein Ohio Sports Center, Inc., an Ohio corporation. Said respondent desires to construct an 18,000 seat sports arena in a semi-rural area between Akron and Cleveland. The petitioners are an Ohio non-profit corporation composed of nearby property owners who oppose construction of the coliseum and the changes in their quality of life which would be caused by the construction of the coliseum in Richfield Township.

By reason of a dispute between the parties as to the proper zoning classification land use (the details of which are not relevant to the subject matter of this Petition) an appeal was carried to the Richfield Board of Zoning Appeals by petitioners the Citizens Organized to Preserve Our Environment (hereinafter COPE) under the following statutory authority (a separate appeal by Ohio Sports Center, Inc., was also taken, but its subject matter has never been at issue):

> The township board of zoning appeals shall have the following powers:
>
> (A) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25, inclusive, of the Revised Code, or of any resolution adopted pursuant thereto . . .
>
> 519.14(A) of the Ohio Revised Code

More that ten days prior to the hearing of August 23, 1971, the Board of Zoning Appeals had printed in a newspaper of general circulation, a notice of hearing upon the combined appeals (see appendix for copy of notice). The hearing notice was filed in accordance with §519.15 of the Ohio Revised Code. It is the application of the hearing notice provision of the statute that petitioners assert is in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Following the hearing, the Board of Zoning Appeals issued a decision granting a use variance and issuing the appropriate zoning certificates. Appeals of that initial decision were taken to the Common Pleas Court of Summit County, the Court of Appeals of Summit County (see opinion in Appendix) and to the Supreme Court of Ohio. In each instance, petitioners raised the issue of improper notice of the hearing subject matter as being a violation of due process of law. In each instance petitioners' contentions upon the Constitutional issue were rejected.

REASON FOR GRANTING THE WRIT

1. The issuance of a zoning use variance to Ohio Sports Center, Inc., was an action which violated petitioners' right to due process of law since they were not supplied with notice that a use variance would be the subject matter of the hearing.

Section 519.15 of the Ohio Revised Code merely requires that a Board of Zoning Appeals "give notice" of a hearing at least ten days before it is held. The issue that petitioners would put before this court is what constitutes notice of adversary administrative proceeding, i.e., is it

sufficient to merely inform parties that a hearing will be held without reference to the complete subject matter of decision?

In the case at bar, nothing in the notice of hearing in any way indicated that a zoning use variance would be considered by the Board of Zoning Appeals. It has been the contention of the respondents and the courts of Ohio that at zoning hearings, a Board of Zoning Appeals may decide any and all zoning issues without regard to its public notice statements. (See opinion of Court of Appeals and *Spencer v. Bd. of Zoning Appeals,* 85 Ohio L. Abs. 361 (Stark Cty. C.P. 1959), 170 N.E.2d 870.

Those who are noticed are entitled to know what will be ruled upon and to be able to present appropriate witnesses at administrative hearings. The contention that an appeal from a zoning inspector's decision allows the board to rule on all aspects of a proposed land use flies in the face of all accepted concepts of fair *adversary* procedures.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . The notice must be of such nature as reasonably to convey the required information.
>
> *Mullane v. Central Hanover Tru. Co.,* 339 U.S. 306, 314 (1960).

Proper notice means much more than simply informing interested parties that a zoning appeal will be heard. It means that those parties will be adequately informed of the issues and that *only those issues will be decided.*

The board set forth the issues in its notice of hearing and should have confined its decision to those boundaries. Several prominent zoning text writers have discussed this imperative at some length:

> The purpose of the notice requirement is to advise those who may have an interest in and a desire to be heard upon the subject of the proposed administrative action so that they may have the opportunity to present their arguments and objections for consideration by the administrative board . . . A notice of hearing may be defective in relation to the statutory requirements in several ways: it may not correspond with the requirement as to time, it may be so vague as to fail to advise persons interested just what action is to be considered, or the notice may be entirely misleading, giving *an erroneous description of the action to be considered.* (Emphasis added)
>
> Rathkopf, 2 THE LAW OF ZONING AND PLANNING, 42-1 (1962).
>
> . . . it is clear that where notice of hearing is required the notice must inform the party entitled to it of the nature of the application.
>
> Anderson, 3 AMERICAN LAW OF ZONING 207 (1968).

By granting a use variance without notice *upon that issue* and thereby precluding the appellants from presenting witnesses, the board engaged in a distinct and unequivocal violation of the appellants' rights. A similar problem was presented in *Brachfeld v. Sforza,* 114 N.Y.S.2d 722 (1952) where the appeals court stated:

> Changes in zoning ordinances affect property rights, and the provisions as to a notice of hearing must be

strictly complied with. A notice which does not warn of the nature of the proposed amendment is no notice. 114 N.Y.S.2d at 725.

By failing to require adequate notice or to define that term for Boards of Zoning Appeal, § 519.15 of the Ohio Revised Code allows for decisions which violate basic concepts of fair procedure. The Fourteenth Amendment provides that no State shall, "deprive any person of life, liberty, or property, without due process of law." This constitutional mandate has been constantly held to require basic fairness in administrative proceeding. No citation of authority is needed to prove that a board of zoning appeals acquires jurisdiction only by the use of proper and complete notice. Instead of ruling that a coliseum in a C-1 zone is an improper use and that the zoning inspector had erred in not refusing a certificate on that basis (the only *use* issue then before it), the Board of Zoning Appeals chose to act without notice of hearing and issue a use variance. If township zoning boards are to be held to elementary standards of fairness, the board's decision cannot be allowed to stand.

Section 519.15 of the Revised Code establishes the necessity that notice of a zoning appeal board hearing be given at least ten days prior to the holding of same. This case raises the important constitutional question of what type and form of notice is necessary to comport with due process of law when a zoning appeals board is aware that it is faced with a two-party adversary proceeding? The courts of Ohio have contended that in the informal proceedings of an administrative agency, such as a zoning appeal board, only general notice of a hearing need be given. The petitioners, on the other hand, insist that due process of law requires more. They urge that before a board of zoning appeals may acquire jurisdiction to render

a final determination on a zoning use variance, it must serve specific notice that it intends to hold a meeting on that issue so that evidence may be presented by both sides.

Waiting until the appeal hearing to advise the parties that additional zoning topics, other than those previously published or expected, will be decided is not enough to satisfy basic constitutional rights. The lower courts in this case seem to equate the fact that appellants were present at the zoning hearing with full due process of law. But due process involves much more: it is the right to prepare ahead of the hearing; it is the right to have witnesses prepared and in attendance; and it is the right to know before a hearing what issues will be heard and decided. The duty to give proper and complete hearing subject matter notice to potential zoning hearing parties is not a harsh one. The basic requirements of fairness and due process require no less.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio and the opinion of the Summit County Court of Appeals.

Respectfully submitted,

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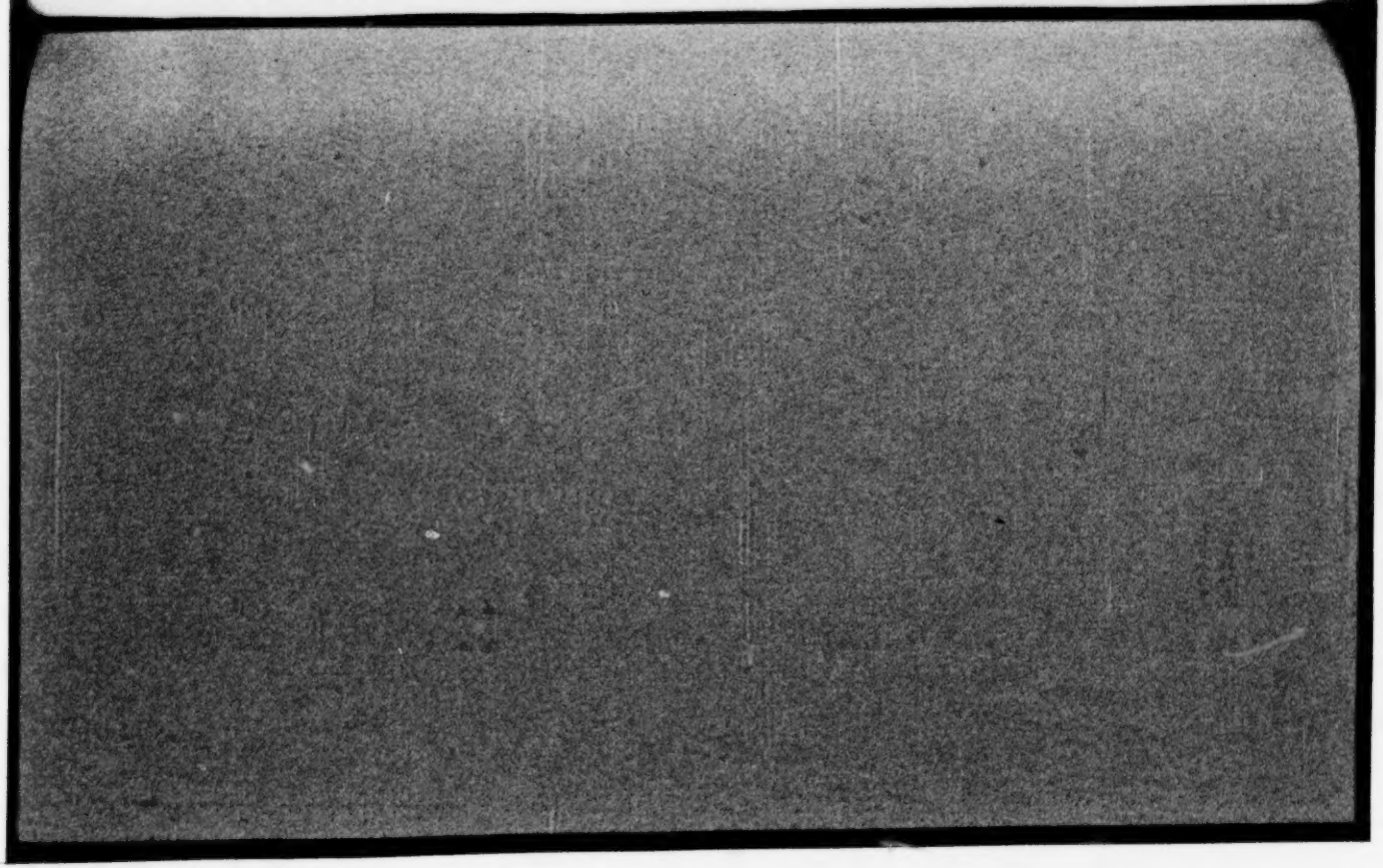
Counsel for Petitioners



APPENDIX

NOTICE OF HEARING ON ZONING APPEAL

A public hearing will be held before the Richfield Township Board of Zoning Appeals on the 23rd. day of August, 1971 at 7 o'clock P.M. at the Richfield Elementary School, 4315 W. Streetsboro Rd., Richfield, Ohio, for the purpose of hearing the following, relative to the Application of Ohio Sports Center, Inc. to erect a Colosseum on its property, approximately at the northwest corner of the intersection of Ohio Route 303 and Interstate 271, Richfield Township, Summit County, Ohio, Property located in a Commercial Zone:

Request for Variance from Height Limitations

Request for Variance from access limitations

Interpretation regarding side yard usage and variance on same if necessary.

Township Board of Appeals of
Richfield Township
George Cooke, Chairman

OPINION OF TRIAL COURT

Case No. 292110

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, SUMMIT COUNTY, SS:

IN RE: APPEAL OF CITIZENS ORGANIZED FOR THE PRESERVATION OF OUR ENVIRONMENT, a non-profit Ohio Corporation, RICHARD W. WAGNER and PAUL C. DAVIS, from the final order of the Board of Zoning Appeals of Richfield Township, rendered on September 8, 1971,

Appellants,

vs.

RICHFIELD TOWNSHIP BOARD OF ZONING APPEALS,

Appellees.

OPINION

HARVEY, J. (By Assignment)

This is a combined appeal brought by the Ohio Sports Center, Inc. and COPE, et al. There was submitted to the Zoning Inspector of Richfield Township an application for a zoning certificate wherein it was proposed to construct a coliseum on the property in question, which property is located in a C-1 District. The construction of this coliseum would require a variance in the building height provision, to wit: 35′, because the building would be 115′ in height, and the water tower would be 150′ in height, and for these reasons the Zoning Inspector turned down the application for a zoning permit. The appeal was taken to the Board of Zoning Appeals, and from the decision of the Board of Zoning Appeals this matter comes into this Court.

When this matter was appealed to the Board of Zoning Appeals, COPE objected to the hearing before the Board on the ground that the Board did not have jurisdiction. This was based upon the fact that the Board of Zoning Appeals shall publish a notice of the hearing before the Board under the provisions of R.C. Section 519.15, and it is the contention of COPE that at that time there was no notice based upon the ground of use and that the statute provides for the specifying of the grounds.

On the occasion when the hearing was had before the Board of Zoning Appeals a transcript of testimony that is before this Court was made. COPE was present at the hearing and agreed that all questions, and particularly the question of use, would be heard at this particular hearing. Through their counsel they participated in the hearing and raised the question of the Board of Zoning Appeals' authority and power to grant the variance. Sworn testimony is not required in a hearing of this kind, and it is the opinion of this Court that the rights of COPE were fully protected at this hearing, and there is nothing to indicate that any inhabitants were deprived of expressing their opinions.

The other question raised by COPE is whether or not there was evidence before the Board which would legally permit or allow the Board to exercise its discretion to grant a use variance.

The Board of Zoning Appeals finally determined that the Ohio Sports Center, Inc. should be granted a variance under Section 1001-7B for the construction of the coliseum in accordance with the plans submitted. They granted this also under certain conditions: That it was the claim that it would be an unnecessary hardship on the appellant, Ohio Sports Center, Inc., not to be able to use such commercially zoned property for such purpose, and it was the final determination within the meaning and purview of the stat-

ute by the Board of Zoning Appeals that if this property were strictly limited to local retail use, such land could not be economically or feasibly used for such purpose; and that the proposed use of this site would be within the spirit of the Zoning Resolution since it is located at an interstate interchange in an undeveloped area; and that the Zoning Resolutions are intended to provide for recreational uses; that while the proposed coliseum would add to the traffic, the inconvenience to the Township residents would be minimum, and the coliseum would benefit the community as a recreational sports center.

So, the Board of Zoning Appeals granted a variance to construct the building to a height of approximately 115′. This building and sports arena will have a capacity of around 17,000 people, and this height is required to give spectators within the building an unobstructed view of the playing surface. A variance is granted to permit the construction of a water tower to a height of approximately 150′ at the rear portion of this property to provide water pressure for fire protection and water pressure for other purposes, and the water tower would be located 1,800′ from the centerline of State Route 303.

A variance is granted to the Ohio Sports Center to permit three access roads into the site, and it was the finding of the Board that such access entrances are reasonably necessary considering the size of the site with approximately 1,800′ frontage and the number of parking spaces which must be served from the access driveways. The Board granted a variance to the Sports Center to have a driveway and parking within a 50′ area measured from the westerly property line.

There were numerous other conditions placed upon the Ohio Sports Center, all giving consideration to the general welfare of the Township. It was the reasoning of the

Board of Zoning Appeals that the coliseum site consists of 100 acres of land located in a C-1 local commercial zone near the easterly boundary of the Township, and immediately opposite the southbound exit of Interstate 271, fronting on State Route 303, with approximately 1,800′ frontage. The proposed coliseum and parking area would include the front 80 acres of the 100 acre site.

It was further the opinion of the Board of Zoning Appeals that this being an undeveloped portion of the Township and within the area encompassed by Black Road on the west and the Ohio Turnpike on the north, and the fact that there are less than 20 residents located in the immediate area, therefore, the coliseum would not affect any highly developed residential area. This was the opinion of the Board. Although the area around this 100 acres was zoned residential, under the C-1 zoning classification in which this property is located the site cannot be used for residential purposes, and because of the lack of residential development within the vicinity of the site, the site could not feasibly or economically be used for local retail uses, and the size of the site of 100 acres far exceeds any probable need for local retail uses in the area within the foreseeable future.

From the traffic standpoint the Board of Zoning Appeals pointed out, and we believe fairly, that this site is uniquely situated since it is directly opposite the southbound exit of I-271 at its point of intersection with SR-303 and, in addition, is located between the two large metropolitan areas of Cleveland and Akron and is readily accessible by major thorofares from all directions, including the Ohio Turnpike, I-77 and I-271. Moreover, the level terrain of this 100 acres makes it particularly suitable for the proposed use as a coliseum. The Board points out that I-271, immediately to the east, and the Ohio Turnpike, im-

mediately to the north of the site, effectively insulate and isolate the site to the north and east. A workable traffic plan has been provided which will facilitate the flow of traffic directly to and from I-271 and which will minimize any additional traffic burden on SR-303. It is proposed to widen SR-303 for at least the 1,800′ frontage, and the State of Ohio has recommended a plan providing for additional exit lanes from I-271 for incoming traffic to the coliseum site.

In the plans sanitary sewage facilities are being provided and the Court points out that such sanitary facilities will be necessary, and it is presumed that the Board is satisfied with what is planned. Public water supply will be available from the City of Akron, and it is also represented that the coliseum will make available to the Township, as well as the nearby metropolitan areas, entertainment and sports events with particular benefit to youth in the community.

The Board also determined that the coliseum will not result in any disadvantages to the community other than increased traffic, for which a workable solution has been provided; that all the property surrounding the coliseum site is zoned residential R-1, and no further commercial development on those properties could be made without the specific approval of the Township. It is also pointed out that the use of the site as a coliseum fits into the zoning plan for the Township since the site is already zoned for commercial purposes and has ready access to the interstate highway system, and furthermore, it is the policy of the Township to encourage recreational uses.

For these salient reasons the Board of Zoning Appeals concluded by unanimous vote that the proper variances should be made in order that this building be constructed.

A township Board of Zoning Appeals, in granting a variance from a zoning resolution, merely varies the use to which a particular piece of property may be put and does not rezone the land covered by variance, the power to rezone being vested in the Board of Trustees. In applying the doctrine that the Board of Zoning Appeals may authorize a variance from the zoning resolution to avoid unnecessary hardship, it is not governed solely by any one particular reason. No single factor determines what constitutes unnecessary hardship, but all relevant factors taken together must indicate such special conditions that the property cannot reasonably be put to a conforming use because of limitations imposed by its classification under the resolution to warrant a variance on such ground.

Doubtless it is difficult, perhaps impossible, for a Board of Trustees in a township or any legislative body enacting a zoning regulation to envisage the result of its regulation upon each piece of property which may be affected or to weigh and adjust each private and public interest that may be involved. Hence, we have a Board of Zoning Appeals, an administrative agency. The function of such Board of Appeals is to provide a measure of flexibility in the application of a general rule imposed for the general welfare. (*Investment Company v. Cutler,* 125 O.S. 12, p. 21)

It has been held that in order to reverse the decision of a township Board of Zoning Appeals in refusing to authorize a variance from the terms of a zoning resolution, it is not necessary for the Common Pleas Court to find that the Board abused its discretion, but it is sufficient if that Court finds that the decision of the Board, in refusing to authorize the requested variance, represents an unreasonable exercise of that discretion. Conversely, in a review of the decision of the Board of Zoning Appeals in this case wherein they granted a variance, the Court must

look to the record as made before the Board of Zoning Appeals and determine whether or not their action is legal and reasonable and supported by a preponderance of substantial, reliable and probative evidence on the whole record.

This property is zoned for retail use. It is true that it may have been contemplated at the time the resolution was passed that the retail use would consist of small retail establishments. It is probably true that it was never anticipated at that time that a recreational arena, which is retailing recreation in the form of admissions to a sports event, would be considered. Certainly the development of small retail establishments upon this particular piece of property is something that would neither occur nor be feasible in the far, foreseeable future, nor would property values be diminished by reason of the construction of this coliseum, nor would the granting of this variance be contrary to the public interest or the welfare of the community, but on the contrary might be of great benefit.

In the case of *Magloons v. The Board*, 168 O.S. 113, p. 120 Chief Justice Taft used the following language:

> "Certainly if appellant is not permitted to so use its land, that will be a hardship upon appellant. It is difficult for us to see any necessity for the imposition of that hardship with respect to such a large parcel of land as is involved in the instant case."

That language could very well be applied to the facts and circumstances as disclosed in this transcript and the reasoning behind the Board of Zoning Appeals' decision could very well be applied in this situation, the same as in that Supreme Court case.

Appellants COPE take the view that in reality the Board was placing the land in question in a zone different

than that in which it had been placed by the resolution, and, thus, they are claiming that the Board took upon itself legislative power which it did not have. This argument is based on a misconception of the nature of the action taken by the Board. This action does not purport to place the land in a different zone. It did not place the land in a different zone because it was zoned for a commercial use. It was a different commercial use than that set forth in the language of the resolution, but it was not a different zone, and it only purports to relieve the property of some of the restrictions which the resolution imposes on the property within the zone in which it lies. It is a grant of a variance with which we are concerned and not a change of zone. The Board did not act illegally, arbitrarily or abuse its discretion in the exercise of whatever power it had to grant variances vested in it by the Zoning Resolution. The power to grant a variance is very necessary in a situation where the strict letter of any provision of the resolution or where the effect of the application of the resolution is arbitrary, and it would certainly be arbitrary if this land should be confined to small, local retail establishments.

We therefore hold that the Board of Zoning Appeals acted reasonably and that their decision is supported by a preponderance of substantial, reliable and probative evidence on the whole record, and under the particular circumstances it was their duty to grant a variance. Their action is therefore affirmed.

OPINION OF OHIO APPELLATE COURT

(January 5, 1972)

No. 6866.

IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT,

STATE OF OHIO, SUMMIT COUNTY, SS.

In re: Appeal of Citizens Organized for the Preservation of our Environment, a non-profit Ohio corporation, Richard W. Wagner and Paul C. Davis, from the the final order of the Board of Zoning Appeals of Richfield Township, rendered on September 8, 1971.

C.O.P.E., INC., Richard W. Wagner, Paul C. Davis,
Appellants,

vs.

Ohio Sports Center, Inc., Board of Trustees of Richfield Township, Summit County, Ohio; John F. Stewart, as Zoning Inspector for Richfield Township, Summit County, Ohio,
Appellees.

APPEAL ON QUESTIONS OF LAW

OPINION

BRENNEMAN, *J.*

Ohio Sports Center, Inc., (Ohio) appealed to the Richfield Township Board of Zoning Appeals (Board) from a refusal by the Zoning Inspector to grant a permit to Ohio for the construction of a proposed coliseum and sports arena in Richfield Township, Summit County, Ohio. The purpose of the appeal by Ohio was to seek a variance as

to height, side yard and access limitations incident to the proposed construction. The appeal of Ohio was numbered 179.

Citizens Organized for the Preservation of our Environment, C.O.P.E., Inc., (COPE) filed a counter-appeal with the Board, being separately numbered 180. The counter-appeal was based upon the claim that the Zoning Inspector erred in refusing the construction permit, in that his refusal was predicated upon building height, side yard and access limitations, whereas in fact, his refusal should have been based upon a use variance of the C-1 zoning classification of the subject property.

Both appeals were heard simultaneously by the Board, after a request by COPE, and the consent of Ohio to so proceed.

The Board determined, in substance:

1. Ohio is granted a variance under Section 1001-7B of the Richfield Township Zoning Regualtions to construct the proposed coliseum.

2. Ohio is granted a variance to construct the coliseum to a height of 115 feet above a specified grade.

3. Ohio is granted a variance to construct a water tower to a height of 150 feet.

4. Ohio is granted a variance to permit three access roads into the site.

5. Ohio is granted a variance to have a driveway and parking within the 50-foot area measured from the westerly property line.

6. All subject to enumerated conditions.

From the order of the Board, an appeal was taken to the Court of Common Pleas by COPE. By agreement of

the parties, no additional evidence was submitted; consideration by that court was confined solely to the record before the Board. The Common Pleas Court affirmed the Board on all issues, and ordered the Zoning Inspector to issue a building certificate.

From that judgment, C.O.P.E., Inc., Richard W. Wagner and Paul C. Davis, have lodged an appeal in this court, declaring as error:

> "1. The decision of the Board of Zoning Appeals to grant a use variance is unsupported by the hearing record.
>
> "2. The Richfield Township Board of Zoning Appeals lacked jurisdiction to issue a use variance to Ohio Sports Center, Inc., and its action in doing so was therefore unconstitutional and void."

The record establishes that Ohio has entered into a contract to purchase 106 acres of land, located at the northwest corner of the intersection of Interstate I-271 and state route No. 303 in Summit County. The location is readily accessible to the Ohio Turnpike and Interstate I-77, both of which are located a short distance from the situs of the land.

The area surounding the 106 acres is rural in nature, and sparsely settled. There are no structures located on the land; about twenty residences are located within a radius of one mile of the site; the nearest one being 1400 feet away. The population of the entire township is approximately 4900.

The entire 106 acres is classified in the Richfield Township Zoning Resolution as C-1 (Commercial District). Section 410-1 of the Zoning Resolution sets forth the purpose of such district as follows:

"This district is established to provide for uses principally to accommodate the sale of convenience retail goods and personal services purchased frequently for daily or weekly needs. It is intended that the design of this district will encourage groupings of establishments located on a unified site providing adequate off-street parking facilities as well as an efficient and safe method of handling vehicular and pedestrian traffic."

The main thrust of appellant's first assignment of error is directed to the proposition that the Board erred in granting a use variance based upon unnecessary hardship, when, in fact, the record contains no evidence of hardship, and no evidence that the land could not now, or in the foreseeable future, be used for the local retail use assigned to it by the resolution.

Ohio Revised Code Section 519.14 provides, in pertinent part:

"The township board of zoning appeals shall have the following powers:

"* * *

"(B) To authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done.

"* * *."

Our examination of the record discloses no substantial proof that the granting of the *use variance*, so as to permit the construction of the proposed coliseum, is contrary to

public interest. We do find evidence of benefits to the public in the event of its construction. The restriction, as now written in consideration of all the circumstances, has no concomitant benefit to the community. See: In re McDonald, 119 Ohio App. 15.

We further find, from the evidence, that the use of the land as prescribed in the C-1 classification, which reads in part: "principally to accommodate the sale of convenience retail goods and personal services purchased frequently for daily or weekly needs," is not economically feasible.

The Board determined from the evidence presented, and so did the Common Pleas Court, that the imposition of the limited use for retail purposes was unnecessary, and that such limited use imposes an unnecessary hardship upon a large parcel of land, beyond the immediate or foreseeable needs of the community here involved. This evidence, in and of itself, compels us to conclude that it was not error to issue a variance, and that this is so irrespective of whether it is economically feasible to use the land for the purposes for which it was zoned.

For comparison with similar situations, as well as authority for the order granting a use variance under conditions here present, see: Mentor Lagoons, Inc. v. Zoning Board of Appeals, 168 Ohio St. 113; and State of Ohio, ex rel. Killeen Realty Company v. City of East Cleveland, 169 Ohio St. 375.

The transcript of the proceedings in this case convinces this court that there is credible evidence of sufficient strength for the conclusion of the Board of Zoning Appeals, and the Court of Common Pleas, that a use variance should be granted from the limitations of the commercial purpose C-1 classification. We approve of the action taken

by the Court of Common Pleas in this respect. We find nothing in the evidence to indicate that either the Board, or the Court of Common Pleas, acted arbitrarily, capriciously, or unreasonably in arriving at their respective decisions.

We find the first assignment of error to be not well taken.

Appellant's second assigned error is directed to the claim that the notice required by Ohio Revised Code Section 519.15 was insufficient in that it failed to give notice that *"use variance"* would be considered at the hearing on the application of Ohio for height, side yard, and access variances.

Section 519.15, Revised Code, reads:

"The township board of zoning appeals shall organize and adopt rules in accordance with the zoning resolution. Meetings of the board of zoning appeals shall be held at the call of the chairman, and at such other times as the board determines. The chairman, or in his absence the acting chairman, may administer oaths, and the board of zoning appeals may compel the attendance of witnesses. All meetings of the board of zoning appeals shall be open to the public. The board of zoning appeals shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of township trustees and be a public record.

"Appeals to the board of zoning appeals may be taken by any person aggrieved or by any officer of the township affected by any decision of the administra-

tive officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the board of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.

"The board of zoning appeals shall fix a reasonable time for the public hearing of the appeal, give at least ten days' notice in writing to the parties in interest, give notice of such public hearing by one publication in one or more newspapers of general circulation in the county at least ten days before the date of such hearing and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any person may appear in person or by attorney."

The notice given by the Board, and published and distributed pursuant to the provisions of Section 519.15, Revised Code, reads as follows:

"A public hearing will be held before the Richfield Township Board of Zoning Appeals on the 23rd day of August, 1971, at 7 o'clock P.M. at the Richfield Elementary School, 4315 W. Streetsboro Rd., Richfield, Ohio, *for the purpose of hearing the following, relative to the Application of Ohio Sports Center, Inc., to erect a colosseum* [*sic*] *on its property,* approximately at the northwest corner of the intersection of Ohio Route 303 and Interstate 271, Richfield Township, Summit County, Ohio, Property located in a commercial zone:

"Request for variance from height limitations;

"Request for variance from access limitations;

"Interpretation regarding side yard usage and variance on same if necessary." (Emphasis supplied).

It is the claim of appellant that this notice fails to raise the issue of a use variance (construction of a sports coliseum), and is confined to height, access, and side yard variances, as requested by Ohio. Further, that such deficiency fails to vest jurisdiction in the Board to consider a use variance.

The record (exhibits) establishes that on the 19th day of July, 1971, appellant, COPE, by letter, informed the Board that it intended to participate in the forthcoming hearing to determine whether a use variance should be granted.

By a further letter, dated August 17, 1971, COPE requested that its own appeal, number 180, be consolidated with appeal number 179, and that both appeals be heard simultaneously (use variance, as well as construction variances). Both issues were presented at the hearing on August 23, 1971.

It is difficult for this court to accept the argument of COPE that it was denied the opportunity to present its case, when, in fact, the record shows that COPE did participate; that it was granted the consolidation it requested; that it did cross-examine the witnesses, and was offered a continuance of the hearing to present additional evidence.

We are of the opinion that the Court of Common Pleas properly affirmed the decision of the Board on this issue; we reject the appellant's claim of error in this regard as untenable, in our consideration of the record.

We find that the notice as given was adequate and comprehensive, and not deceptive, misleading, or concealing in any material aspect of the issues.

In summary, this court is of the opinion that the Board was well informed by all the evidence, and that its decision was well founded upon competent and credible evidence. We also find the decision of the Board to be valid and reasonable, and free from any prejudicial error, and that the Court of Common Pleas did not err in affirming the Board's decision. See: 58 Ohio Jur. 2d 613, Sec. 158.

The judgment of the Court of Common Pleas is affirmed.

Judgment affirmed.

DOYLE, *P. J.*, and VICTOR, *J.*, concur.

ORDER OF OHIO SUPREME COURT

No. 72-107

THE SUPREME COURT OF THE STATE OF OHIO
The State of Ohio, City of Columbus

COPE *et al.*,
Appellants,

vs.

RICHFIELD TOWNSHIP BOARD OF ZONING APPEALS *et al.*,
Appellees.

Appeal from the Court of Appeals for Summit County.

This cause, here on appeal as of right from the Court of Appeals for SUMMIT County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for SUMMIT County for entry.

JUN 2 1972

MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1540

CITIZENS ORGANIZED TO PRESERVE
OUR ENVIRONMENT, *et al.*,
Petitioners,

vs.

RICHFIELD BOARD OF ZONING APPEALS
and
OHIO SPORTS CENTER, INC.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT OHIO SPORTS CENTER, INC. IN OPPOSITION

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The instant Petition merely presents issues of fact limited to the particular circumstances of the proceedings below and having no general significance. Moreover, the Petition is without merit since Petitioners were given adequate notice of the proceeding before the zoning board and any possible defect in such notice was waived or cured by the Petitioners' participation in the proceedings before the board and the Court of Common Pleas.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT OHIO SPORTS CENTER, INC. IN OPPOSITION

QUESTION PRESENTED

Whether the notice of a public hearing before the Richfield Township (Ohio) Board of Zoning Appeals to consider the granting of a zoning variance for a particular property contained sufficient facts as to the nature of the proceeding to constitute adequate notice to the public under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

* Under Ohio law, the Board of Zoning Appeals is not a proper party and cannot be a party to a proceeding to review its decision. The appellees in the proceedings below were the Richfield Township Board of Trustees, the Richfield Zoning Inspector, and Ohio Sports Center.

COUNTER-STATEMENT OF THE CASE

The insubstantial nature of the instant petition is best demonstrated by a factual statement of the proceedings below.

On July 17, 1971, Respondent Ohio Sports Center, Inc. applied for a permit to construct a sports coliseum on a 100-acre site in Richfield Township, Ohio, zoned as a C-1 local commerical district. The permit was denied by the Township Zoning Inspector and Ohio Sports Center appealed to the Township Board of Zoning Appeals, requesting variances to permit the construction.

Pursuant to this appeal, the Board published the following notice of a public hearing to consider the question of whether the variances should be granted:

> A public hearing will be held before the Richfield Township Board of Zoning Appeals on the 23rd. day of August, 1971 at 7 o'clock P.M. at the Richfield Elementary School, 4315 W. Streetsboro Rd., Richfield, Ohio, for the purpose of hearing the following, relative to the Application of Ohio Sports Center, Inc. to erect a Colosseum on its property, approximately at the northwest corner of the intersection of Ohio Route 303 and Interstate 271, Richfield Township, Summit County, Ohio, Property located in a Commercial Zone:
>
> Request for Variance from Height Limitations
> Request for Variance from access limitations
> Interpretation regarding side yard usage and variance on same if necessary.

Since the proposed coliseum had received considerable publicity, Petitioner C.O.P.E. was formed even prior to the time the building permit was requested, for the specific purpose of opposing construction of the coliseum. Even before the Zoning Inspector denied the permit, C.O.P.E.'s attorneys wrote to the Board stating that C.O.P.E. intended to participate in the forthcoming pro-

ceedings to determine whether a use variance for the coliseum should be granted. After the permit was denied, C.O.P.E. and two of its members (the Petitioners) filed an appeal to the Board* urging that the coliseum was not a permitted use in a C-1 district. At C.O.P.E.'s request, its appeal was consolidated with that of Ohio Sports Center. In demanding the consolidation, C.O.P.E.'s attorneys, by letter to the Board prior to the hearing, asserted that "the primary issue" to be resolved was "proper land use in a C-1 zone," and that this was "the threshold issue" that the Board was required to decide.

Both appeals were then heard at a public hearing at which all persons present, including the members of C.O.P.E. and their attorneys, were given a full opportunity to testify, produce evidence, cross-examine witnesses and present argument on any and all matters relating to the proposed use. In fact, before closing the hearing the Board chairman specifically asked C.O.P.E.'s attorneys if they had anything further to offer. They replied that they had nothing more and were resting their case. The notoriety of the proceedings is demonstrated not only by the large number of persons attending the hearing, but by the fact that at the hearing petitions signed by 695 adult residents of the Township (out of a total population of only 4900) were submitted in favor of the coliseum. In addition, the record before the Board shows that the coliseum had been approved prior to the hearing by the Township Board of Trustees, the Board of Park Commissioners, the Area Progress Board of Summit, Portage and Medina Counties, the Tri-County Regional Planning Commission and the Richfield Village Council.

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* Under Ohio law "any person aggrieved" by a decision of the Zoning Inspector can appeal to the Board of Zoning Appeals. Ohio Rev. Code § 519.15 (set out in the Appendix).

The Board of Zoning Appeals unanimously granted the variances sought by Ohio Sports Center, subject to a number of specific conditions assuring full protection to the community. The detailed findings of fact by the Board, all of which are substantially supported by the record, established the propriety of the Board's action. Indeed, on appeal, both the Common Pleas Court and the Court of Appeals, after reviewing the record before the Board, held that the facts were such that the Board would have abused its discretion and denied Ohio Sports Center its constitutional rights had it denied the use variance.

At the hearing before the Board, Petitioners, in the face of the language of the notice stating that the erection of a coliseum would be considered and despite their own appeal on the use issue, took the position that since the notice of the public hearing did not specifically state that Ohio Sports Center was seeking a use variance, they would be denied due process if the Board considered this question. However, when the Board went ahead and received evidence on this issue, C.O.P.E.'s attorneys proceeded to cross-examine witnesses and present argument. At no time did they request a continuance or a further opportunity to present evidence. Rather, when offered such an opportunity by the Board, they asserted that they had nothing further to present.

Having lost before the Board, the Petitioners sought review in the Court of Common Pleas (the trial court level in Ohio). Under Ohio law, any defect in the proceedings before the Board gives the appellant the full legal right before the Court of Common Pleas to present evidence on the merits and to cross-examine the witnesses who testified below. Ohio Rev. Code § 2506.03 (set forth in the Appendix). Petitioners not only did not request the opportunity to present any such evidence, they agreed that the Court of Common Pleas

should base its decision on the record before the Board. The Court of Common Pleas affirmed the decision of the Board and was in turn affirmed by the Court of Appeals. The Ohio Supreme Court, *sua sponte*, dismissed Petitioners' appeal on the ground that it involved no substantial constitutional question. (The opinions of all three courts are printed in the Appendix to the Petition for Writ of Certiorari.)

REASONS FOR DENYING THE WRIT

The instant Petition presents a question of fact as to whether the wording of the notice set out above, under the peculiar circumstances of this case, contained sufficient information so that the Township Board of Zoning Appeals acted within the Constitution when it granted Ohio Sports Center the right to use its property for a coliseum. A further factual question that must be resolved is whether by filing their own appeal as to the use issue, by appearing and participating at the public hearing, and by failing to exercise their right to present evidence in the Court of Common Pleas, Petitioners waived any possible defect in the original notice.

Therefore, regardless of the outcome of this matter, should this Court decide to hear it, the decision will have no general importance, will involve no significant point of law, will establish no useful precedent and will resolve nothing but very narrow factual issues pertinent only to this particular case. This is not a matter for this Court to concern itself, especially since the Petitioners have raised the same issue in three successive courts below, and it has been decided adversely to them in each instance.

Moreover, there is no genuine or substantial issue of federal—or of state—law involved in this case. The position of Petitioners is completely without merit.

Petitioners are members of the general public having no direct interest in the land for which the variance was requested. The notice, which Petitioners concede they received, gave a specific description of the date, time and place of hearing, and also clearly stated that the purpose of the hearing was to consider the application of Respondent to erect a coliseum on its property. The notice gave a specific description of the property and its location.

Certainly, in the context of a notice to the general public of a proceeding before a zoning board, the notice at issue fully complies wth the requirements of due process.

Petitioners are confusing the requirements of common law form pleading with the due process requirements of a public notice. As the Ohio Court of Appeals stated in *Roper v. Board of Zoning Appeals,* 115 Ohio App. 62, 67, 184 N.E.2d 439 (1961), aff'd, 173 Ohio St. 168, 180 N.E.2d 591 (1962):

> "The law does not, nor should not, require the particularity of pleadings or summonses as is required in courts of law; and the essential requirement is that the subject matter of the controversy be described with reasonable certainty, and that all persons who may be damaged by the action of the board be given the right to become actual participants in the proceedings and to protect their rights as parties."

This standard was complied with in the instant case. Certainly, due process requires no more.

Petitioners would have this Court hold that due process imposes not merely a requirement of fair and reasonable notice, but rather a rigid requirement of form pleading in public notices published by a zoning board—a standard which is no longer required, if it ever was, even in judicial proceedings. Respondent considers it self-evident that this is not the law.

But even if this were not clear, the Petitioners' position that the Board could not consider the question of use variance ignores the other facts in the case. Petitioners themselves filed a separate appeal on the question of proper land use and requested that it be consolidated with the appeal of Ohio Sports Center. Petitioners, represented by counsel, appeared at the hearing, presented evidence and cross-examined witnesses. When the Board indicated that it would be willing to give Petitioners a further opportunity to present their case, they asserted that they had nothing further to offer and were resting their case. Before the Court of Common Pleas, where Petitioners had the right to present evidence, they declined to do so and instead agreed that the case should be decided on the record below. Thus, the record clearly establishes that even if there were a defect in the original notice, this has been waived.

In summary, therefore, the Petitioners have raised only narrow factual issues of no general significance beyond this immediate case. Moreover, the notice was adequate on its face, and the Petitioners appeared with counsel and fully participated in the hearing before the Board. They had a further full opportunity to present evidence on the merits in the Common Pleas Court—an opportunity which they expressly declined to exercise.

CONCLUSION

For the reasons stated the Petition should be denied.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

§ 519.15. Rules, organization and meetings of zoning appeals board.

The township board of zoning appeals shall organize and adopt rules in accordance with the zoning resolution. Meetings of the board of zoning appeals shall be held at the call of the chairman, and at such other times as the board determines. The chairman, or in his absence the acting chairman, may administer oaths, and the board of zoning appeals may compel the attendance of witnesses. All meetings of the board of zoning appeals shall be open to the public. The board of zoning appeals shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of township trustees and be a public record.

Appeals to the board of zoning appeals may be taken by any person aggrieved or by any officer of the township affected by any decision of the administrative officer. Such appeal shall be taken within twenty days after the decision by filing, with the officer from whom the appeal is taken and with the board of zoning appeals, a notice of appeal specifying the grounds. The officer from whom the appeal is taken shall forthwith transmit to the board of zoning appeals all the papers constituting the record upon which the action appealed from was taken.

The board of zoning appeals shall fix a reasonable time for the public hearing of the appeal, give at least ten days' notice in writing to the parties in interest, give notice of such public hearing by one publication in one or more

newspapers of general circulation in the county at least ten days before the date of such hearing and decide the appeal within a reasonable time after it is submitted. Upon the hearing, any person may appear in person or by attorney.

§ 2506.03. Hearing of appeal.

The hearing of such appeal shall proceed as in the trial of a civil action but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears on the face of said transcript or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

(1) To present his position, arguments and contentions;

(2) To offer and examine witnesses and present evidence in support thereof;

(3) To cross-examine witnesses purporting to refute his position, arguments and contentions;

(4) To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

(5) To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use

the power of subpoena when possessed by the officer or body.

(E) The officer or body failed to file with the transcript, conclusions of fact supporting the order, adjudication or decision appealed from;[,] in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.